SUPREME COURT, U. S.

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 354

FRANCISCO TORRES RAMOS,

PETITIONER

v.

S. S. DETROIT, BEAUREGARD, INC.
and SEA LAND SERVICES, INC.,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

HARVEY B. NACHMAN, ESQ.
Counsel for Petitioner
P. O. Box 2407
San Juan, Puerto Rico 00903

GUSTAVO A. GELPI, ESQ.
NACHMAN, FELDSTEIN, GELPI, ANTONETTI & SMITH
Of Counsel

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and SEA LAND SERVICES, INC.
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the First Circuit, entered in the above entitled case, on April 7, 1970.

Opinions Below

The Order of the District Court for the District of Puerto Rico, dated May 2, 1968, and the Summary Judgment, entered pursuant to the foregoing Order are printed as Appendix A, pp. 17-20. The Order of October 17, 1968, denying a Motion under Rule 59 (e) to Vacate and or to

Reconsider Summary Judgment is printed as Appendix B, pp. 21-22. The Order and Summary Judgment, dated January 20, 1970, in favor of the S. S. Detroit and Litton Industries Leasing Corporation, as claimants, are printed as Appendix C, pp. 23-24.

The Opinion of the Court of Appeals for the First Circuit, not yet reported, is printed as Appendix D, pp. 25-29.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was made and entered on April 7, 1970 and copy thereof is appended to this petition in the Appendix D, p. 25. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Rule 19 of the Supreme Court Rules.

Questions Presented

The questions presented for review are:

1. (a) Is a vessel in the possession and control of a demise charterer liable *in rem* for injuries to a longshoreman caused by the unseaworthiness of a vessel, if the unseaworthy condition arises while the demise charterer is in possession and control?

(b) Does the immunity granted an employer under a local workmen's compensation law absolve a vessel of its *in rem* liability for unseaworthiness, just because the employer is also the bareboat charterer of the vessel at the time of an injury?

These questions comprise other issues, e.g.: whether a vessel may be liable *in rem* for unseaworthiness if there is no *in personam* liability on the part of the owner or demise charterer; whether the longshoreman's right to a seaworthy vessel is extinguished by his employer becoming the demise charterer; whether the shipowner's duty to fur-

nish a seaworthy vessel may be contracted away by means of a demise charter; and whether the shipowner can avoid the obligation of furnishing a seaworthy vessel by temporarily parting with possession and control under a demise charter.

2. Is a longshoreman injured in the navigable waters of Puerto Rico on an unseaworthy vessel operated and controlled by his employer under a demise charter barred from recovery for violation of his federally created maritime rights and lien merely because the employer is immune under a state statute?

This question comprises several subsidiary questions of critical importance in the administration of the admiralty and maritime law:

(a) Whether an American citizen injured in Puerto Rican waters may be deprived of his maritime rights and lien by local legislation and, if so, whether such deprivation violates the constitutional requirements of uniform application of maritime law and the equal protection of the laws.

(b) Whether an American longshoreman injured in Puerto Rican waters is entitled to the rights, privileges and immunities of all other American longshoremen and, if so, whether the decisions of the Court of Appeals violates the Act of Congress by which the rights, privileges and immunities of American citizens in Puerto Rico are to be respected to the same extent as if Puerto Rico were a state of the union.

3. May a federal court deny an injured longshoreman his federally-created rights and remedies against a vessel and demise charterer based on local legislation inconsistent with maritime and federal law, and at the same time, deny to that longshoreman his state-created rights and remedies against the shipowner, based on federal maritime law?

This question comprises the subsidiary issue of the power of a federal court to grant state created immunities and remedies under the saving to suitor clause in civil cases; whether state created immunities and remedies are enforceable in admiralty; and whether a federal court can apply state or forum law to immunize a demise charterer from liability and ignore the law of the same jurisdiction that would impose liability on a shipowner for an unseaworthy condition created by the demise charterer.

Constitutional Provisions, Treaties Statutes and Rules Involved

The constitutional provisions involved are:

1. United States Constitution, Article III, § 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subject."

2. Article IV, § 2, Clause 1:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

3. Amendment XIV, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutes involved are:

1. Public Law 368 of March 2, 1917, c. 145, § 2, 39 Stat. 951, Title 48 U.S.C.A. § 737, amended in Public Law 362 of August 5, 1947, c. 490, § 7, 61 Stat. 772, 48 U.S.C.A. § 737, continued in effect by Public Law 600 of July 3, 1950, c. 446, § 5(1), 64 Stat. 320, 48 U.S.C.A. § 737:

"The rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union and subject to the provisions of paragraph 1 of section 2 of article IV of the Constitution of the United States."

2. Law No. 45 of 1935, Laws of Puerto Rico, p. 259, § 20, 11 L.P.R.A. § 21:

"When an employer insures his workmen or employees in accordance with this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in

case of accident to, or disease or death of, the workmen or employees not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be, the same as if this chapter did not exist."

Statement

Petitioner, a longshoreman, was injured while working on board the S. S. Detroit in the harbor of San Juan, Puerto Rico, on August 5, 1963. He filed a complaint on May 25, 1964, based on diversity of citizenship against respondent, Sea Land Service, Inc. (Copy is included as Appendix E, p. 30). On December 31, 1964, an amended complaint was filed joining respondent, Beauregard, Inc. as co-defendant (Appendix F, p. 31). The answer to that amended complaint alleged as affirmative defenses that Sea Land Service, Inc. as *pro hac vice* owner was immune from liability under the Puerto Rico Workmen's Compensation Act, 11 L.P.R.A. § 42 and that Beauregard, Inc., as owner, was not liable because the unseaworthy conditions causing the injury occurred while the vessel was out of its possession and control. (Appendix G, p. 38).

Motions for Summary Judgment were filed by both respondents. (Appendix H, p. 41). The District Court for the district of Puerto Rico relying on the decisions of *Sea Land Co. v. Perez Rodriguez*, 376 F.2d. 35 (1 Cir. 1965); *Ruiz Pichirilo v. Maisonet Guzman*, 290 F.2d. 812 (1 Cir. 1961); and *Vitco v. Balboa Shipping Co.*, 163 F.2d. 286 (1 Cir. 1947), granted respondents' motions in an Order dated April 25, 1968 (Appendix A, p. 17) and on May 2, 1968 entered Summary Judgment (Appendix A, p. 20). Petitioner then moved pursuant to Rule 59 (e) to Vacate and or Reconsider Summary Judgment. While that motion was being considered, the S. S. Detroit, was

seized by an *in rem* action (Appendix I, p. 43). The District Court was requested to consolidate the two actions, but declined in its Order dated October 17, 1968, denying petitioner's motion (Appendix B, p. 21).

Eventually, Summary Judgment was entered on January 20, 1970, in favor of the S. S. Detroit and the claimant, Litton Industries Leasing Corporation, and against the petitioner (Appendix C, p. 23). On Appeal, the civil action against Beauregard, Inc. and Sea Land Services, Inc. was consolidated with the admiralty *in rem* action against the S. S. Detroit. The Court of Appeals for the First Circuit, based upon the same decisions as the District Court, affirmed the judgment below.

Reasons for Granting the Writ

I. In Deciding That a Vessel Is Not Liable *in rem* When a Shipowner, Either Actual or *pro hac vice*, Is Exonerated From Liability, the Court of Appeals For the First Circuit Has Decided an Important Question of Admiralty and Maritime Law Directly in Conflict With Decisions of This Court.

The result reached by the opinion below is directly in conflict with decisions of this Court holding that *in rem* liability may be imposed even when the owner may not be liable *in personam*. *The Palmyra*, 25 U.S. (12 Wheat.) 1, 6 L.Ed. 531; *The Malek Adhel*, 43 U.S. (2 How.) 212, 11 L.Ed. 239; *The China*, 74 U.S. (7 Wall) 53, 19 L.Ed. 67; *The Barnstable*, 181 U.S. 464; *Cramady* v. *The Joachim Hendrick Fisser*, 358 U.S. 423. These decisions recognize the personality of a vessel apart from that of its owner and have imposed legal obligations upon the object regardless of the owner's fault, control or knowledge. The more recent decision of *Reed* v. *Steamship Yaka*, 373 U.S. 410, holds a vessel liable under identical circumstances to those present in this case. In *Reed* the bare boat charterer and

pro hac vice owner of the Yaka was immune from personal liability because of the Federal Longshoreman & Harbor Workers Act, 33 U.S.C. § 905, yet, this Court found no impediment to holding the vessel liable although for different reasons. *Reed v. Yaka*, supra at 412.

The decision of the Court of Appeals in effect repeals *in rem* liability of a vessel as it has been developed by this Court, at least insofar as occurrences within the territorial waters of Puerto Rico. These cases have rejected the personal defenses and immunities of an owner or *pro hac vice* owner as a bar to the imposition of *in rem* liability. The decision below departs from that principle allegedly because a longshoreman's exclusive remedy is workmen's compensation under a state statute which purports to immunize the *pro hac vice* owner of the vessel. If liability can attach to property for collisions, piracy and other acts beyond the control of the owner, no justification exists for curtailing said liability when a human being is injured. This court has recognized that the obligation to provide a seaworthy vessel cannot be shifted about, limited or escaped by contracts or the absence of contract, and that the shipowner's obligation is rooted, not in contracts, but in the hazards of work. *Reed v. Yaka*, supra, at pp. 414-415, *Gutierrez v. Waterman Steamship Corp.*, (1963) 373 U.S. 206; *Seas Shipping Co. v. Sieracki* (1946) 328 U.S. 85. Despite such sweeping language, the Court of Appeals for the First Circuit has deliberately ignored these humanitarian principles. Petitioner's need for protection was neither more nor less than that of Reed; he was subject to the same danger and, therefore, entitled to the same treatment under the law. *Reed v. Yaka*, supra, at p. 415; *Pope & Talbot v. Hawn*, 346 U.S. 406, 413 (1953).

In rem liability is an important remedy of the maritime law which should be kept intact. Because the opinion below seriously encroaches upon this form of redress in complete

disregard of those affected thereby, this Court ought to review the question presented.

II. In Deciding That a Vessel Is Not Liable *in rem* For an Unseaworthy Condition Arising After a Demise Charter, the Court of Appeals For the First Circuit Has Decided an Important Question of Admiralty and Maritime Law Directly in Conflict With Decisions of Other Courts of Appeals.

In *Vitozi* v. *Balboa Shipping Company*, 163 F.2d. 286 (1 Cir. 1947), the Court of Appeals for the First Circuit decided that an owner would not be liable *in personam* for unseaworthiness of a vessel not under his control and possession. In *Grillea* v. *United States*, 232 F.2d. 919, 924 (2 Cir. 1956), Judge Hand stated that he saw no reason why a vessel should never be liable unless the owner or someone else was liable *in personam*. Subsequently, the First Circuit limited the doctrine of *Vitozi* v. *Balboa*, supra, to post-charter conditions, in *Ruiz Pichirilo* v. *Maysonet Guzman*, 290 F.2d. 812 (1 Cir. 1961). There it was held that the vessel did not respond *in rem* without an underlying *in personam liability*, of some person, either natural or artificial.

To reconcile these diametrically opposed viewpoints, this Court granted certiorari, in *Guzman* v. *Pichirilo*, 368 U.S. 895; but did not decide the issue, *Guzman* v. *Pichirilo*, 369 U.S. 698, 699 n.3, and reversed the Decision of the Court of Appeals on other grounds. Subsequent thereto, the Court of Appeals for the Third Circuit aligned itself with the position the Court of Appeals for the First Circuit had taken, *Reed* v. *The Yaka*, 307 F.2d. 203 (3 Cir. 1962). Once again the importance of the question of whether personal liability was essential to the liability of a ship prompted this Court to grant certiorari, *Reed* v. *The Steam-*

Ship Yaka, 371 U.S. 938; but, once again the question of the need for underlying *in personam* liability was left unresolved. *Reed v. Yaka*, 373 U.S. 410, 412. Since then, the Court of Appeals for the Fifth Circuit has followed the reasoning of *Guillot* in at least two cases. *Lusich v. Bigger Bulk Steamship Companie*, 365 F.2d. 740, 741 (5 Cir. 1966); *Grumbo v. Coastal Marine Service of Texas, Inc.*, 412 F.2d. 1031, 1030-1031 (5 Cir. 1969). The issue is as alive today as it was then, with each Circuit Court continuing to apply its own standard. Moreover, the position of the Court of Appeals for the First Circuit is implicitly in direct conflict with the post *Reed* decision in *Jackson v. Lykes Bros. S.S. Co.* (1967) 386 U.S. 731. This undesirable situation results in unequal treatment under the law to persons similarly situated, and is, therefore, contrary to the principle of uniformity in the application of the maritime law embodied in the grant of admiralty and maritime jurisdiction of section 2 of Article III of the Constitution.

To resolve the conflict, certiorari should once again be granted.

III. In Deciding That the Rights Granted to All American Longshoremen by the Admiralty and Maritime Laws of the United States Do Not Apply to Puerto Rican Waters, the Court of Appeals Has Decided an Important Question of Admiralty and Maritime Law in Conflict With the Constitution and Laws of the United States.

The Court of Appeals for the First Circuit held in *Lastra v. New York & Porto Rico S.S. Co.*, 2 F.2d. 812 (1 Cir. 1924) that the Puerto Rico Workmen's Compensation Act, 11 L.P.R.A. §§ 1-42, applies to maritime workers on the navigable waters of Puerto Rico, notwithstanding the cases of *Southern Pacific Co. v. Jenson* (1917), 244

U.S. 205; *Knickerbocker Ice Co. v. Stewart* (1920) 253 U.S. 149; and *State of Washington v. W. C. Dawson & Co.* (1924), 264 U.S. 219. Many years later, the same court interpreted the Puerto Rican Act as the exclusive remedy vis-a-vis their employers of the seaman, *Fonseca v. Prann*, 282 F.2d. 153 (1 Cir. 1960) and the longshoreman, *Alega Steamship Co. v. Perez Rodriguez*, 376 F.2d. 23 (1 Cir. 1968), injured in Puerto Rican waters on board United States flag vessels. The opinion below follows the previous decisions with the result that the maritime workers injured in Puerto Rican waters are set apart from their continental brethren in the enjoyment of the rights and remedies extended to them as a class.

As the *Lastra, Fonseca* and *Alega* decisions indicate, the Court of Appeals understands that Congress, under Article IV, section 3, paragraph 2, has given Puerto Rico broad powers to legislate in the maritime field. But, whatever this power may be, it is limited by the Federal Relations Act, particularly, Public Law 600, § 5 (1), 48 U.S.C. § 737. According to that Act, American maritime workers in Puerto Rico are entitled to the rights, privileges and immunities of all American citizens similarly situated. But, in interpreting the Puerto Rico Workmen's Compensation Act as the exclusive remedy of the injured worker against his employer and the employer's property even if leased, the appellate court denies petitioner the right to a seaworthy vessel without any social or economic justification. The decision below also denies him equal rights and equal protection of the laws, despite 48 U.S.C. § 737, which requires that his federal rights must be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union and subject to the provisions of paragraph 1 of section 2 of Article IV of the Constitution.

The holding of the opinion below on this point is irrecon-

cikable with the authoritative decisions of this Court, the Constitutional grant of admiralty and maritime jurisdiction, and the axiomatic principle of uniformity in the application of this law. *Panama R. Co. v. Johnson* (1923) 264 U.S. 375; *Southern Pacific v. Jensen*, supra; *Knickerbocker Ice Co. v. Stewart*, supra; *State of Washington v. W. C. Dawson & Co.*, supra; *Romero v. International Terminal Operating Co.*, (1959), 358 U.S. 354. The Court of Appeals for the First Circuit has on one occasion recognized the requirement of uniformity in the application of the maritime law. Amazingly, that requirement was found necessary in the only case where Puerto Rico Government deliberately sought to exercise the powers implicit in the decisions of *Lastra, Fonseca* and *Alcoa*; but such attempts met a prompt death. *Alcoa S.S. Co. v. Velez*, 376 F.2d. 521 (1 Cir. 1968). Yet in the case at bar, the Appellate Court rejected petitioner's request to have his claim against the shipowner decided under the Civil Code of Puerto Rico, 31 L.P.R.A. § 5141, pursuant to the "saving to suitors" clause 28 U.S.C. § 1333.

In construing the applicable laws in this and in preceding cases, the Court of Appeals for the First Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power in protecting and assurring federally created and Constitutional rights.

IV. In Deciding That the Savings to Suiters Clause Is Remedial Only, the Court of Appeals Has Decided an Important Question of Federal Law in Conflict With the Decisions of This Court and Other Courts of Appeals.

Petitioner contends that the Civil Code, 31 L.P.R.A. 5141 provides a remedy against the shipowner for unseaworthiness, even though the latter had parted with

possession and control of the vessel. *Barrientos v. Government of the Capital* (P.R. Supreme Court, June 27, 1967)[1]; *Gbenago v. West Indies Trading Corp.*, 88 P.R.R. 847, 883-884 n. 14. The remedy available to petitioner was invoked pursuant to the "saving to suitors" clause, 28 U.S.C. 1332.

The Court of Appeals apparently misapprehended the jurisdictional basis of the action against the shipowner and treated the same as an admiralty "libel in personam"; holding, as it did, that "if the claim fails under the law of admiralty, it cannot be revived by invoking local law."[2] If, on the other hand, the appellate court considered the question under the proper jurisdictional grounds, then its decision on this point is directly in conflict with the "savings to suitors" clause, 28 U.S.C. 1333, and with decisions of this Court interpreting the extent to which said statute authorizes common law remedies in cases which otherwise would fall within the exclusive jurisdiction of admiralty.

By reason of the saving clause, state courts have jurisdiction *in personam* concurrent with admiralty courts of all causes of action maritime in their nature.

A state law cannot modify or amend either the substantive or procedural laws of the admiralty courts. But the savings to suitors clause does preserve the "right of a common-law remedy" in all other proceedings which may be used to enforce rights or to redress the injury involved. *Red Cross Line v. Atlantic Fruit Co.* (1924) 264 U.S. 109, 123-124; *Garrett v. Moore-McCormack Co.* (1942) 317 U.S. 239, 245.

Here we have the anomalous situation where the tort law of the Commonwealth of Puerto Rico and the general

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[1] Official translation is not yet reported. A copy of certified translation is included as Appendix J, at p. 47.

[2] Opinion below, at pp. 2-4, Appendix D, pp. 26-28.

maritime and admiralty law are essentially the same. The Court of Appeals for the First Circuit has held that the general maritime law cannot be applied because Puerto Rico Workmen's Accident Compensation Act provides an exclusive remedy against the employer and his property. Thus the rights of the longshoreman *in personam* against Sea Land Service, Inc., which this Court said he had, *Jackson* v. *Lykes*, supra, were denied. His rights against Beauregard, Inc. were denied because the Court of Appeals for the First Circuit believes that a shipowner cannot be liable for conditions that arise after the demise (Point II, supra). The *in rem* liability was denied, because the Court construes the property to be owned by the *pro hac vice* owner and unreachable because of the exoneration granted by Workmen's Accident Compensation statute of Puerto Rico.

Yet when the plaintiff invokes the state tort law, which he contends would subject the demisor and the vessel to the same liability that is imposed by the general maritime law, and is thus supplemental and not destructive of admiralty principles, he is told that he cannot utilize the savings to suitors clause because that is remedial only.

When state statutes are supplemental to the admiralty law, they may be utilized in toto. *Red Cross Line* v. *Atlantic Fruit Co.*, supra.

The opinion of the Court of Appeals conflicts with the above principles because it denies petitioner a substantial remedy provided by 31 L.P.R.A. § 5141, saved to him by virtue of 28 U.S.C. § 1331. The remedy sought by petitioner herein does not conflict with or alter any of the accepted rules of admiralty and maritime law. Specifically, the question of whether a bare boat charter absolves the owner from liability on its warranty of seaworthiness is a question this Court reserved in *Guzman* v. *Pichirilo*, 369 U.S. 698, 700, and was not reached in *Reed* v. *Yaka*, 373

U.S. 410, 411 n. 1. In the absence of an authoritative rule, petitioner could properly invoke the remedies afforded by Puerto Rican law. The same appellate court which now denies petitioner's claim under local law had previously held that the Civil Code, 31 L.P.R.A. § 5141, encompassed a cause of action based on unseaworthiness and was thus supplemental to the admiralty law. *Compañía Trasatlantica Española, S.A. v. Melendez Torres*, 358 F.2d. 209 (1 Cir. 1966).

If under the Civil Code of Puerto Rico a shipowner is liable for unseaworthiness, and if possession and control is immaterial to the existence of such personal liability; then the decision below deprives petitioner of a substantial right or remedy of the "common law" saved to him by 28 U.S.C. § 1333.[3] Furthermore, the fact that this Court has not found it necessary to decide the question and adopt a national rule regarding the shipowner's liability under these conditions, appears as an indication that the establishment of such national rule is not essential to commerce and navigation. *Madruga v. Superior Court*, (1958) 346 U.S. 556, 562 563, and may, therefore, be regulated by the Civil Code of Puerto Rico.

To decide this important question and clear up the confusion created by the Court of Appeals' inconsistent interpretation of a federal statute, certiorari should be granted. Furthermore, the decision ought to be reviewed in order to define, clarify or limit the extent to which state created rights and remedies may be invoked to supplement the admiralty and maritime laws.

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[3] A similar right is also provided by the Louisiana Civil Code in Article 2315, *Grigsby v. Coastal Marine Service of Texas, Inc.*, supra, at p. 1029.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HARVEY B. NACHMAN
Counsel for Petitioner
P.O. Box 2407
San Juan, Puerto Rico 00903

APPENDIX A

ORDER

This is an action *in personam* filed by Francisco Torres Ramos against Beauregard, Inc. and Sea Land Service, Inc. claiming compensation for damages alleged to have been sustained by the plaintiff while working on board the SS DETROIT in the harbor of San Juan, Puerto Rico on August 5, 1963.

The defendants filed a motion for summary judgment in their favor; from which there appear the following facts which have not been contested by the plaintiff:

That on the date of the accident the SS DETROIT was operated, managed and manned and was then in possession and control of the codefendant Sea-Land Service, Inc. under a Demise Charter entered into and executed between said owner and the codefendant Beauregard, Inc., pursuant to which Sea Land Service, Inc. was the owner of the SS DETROIT *pro hac vice*; that at the time of the occurrence of the accident referred to in the complaint Francisco Torres Ramos was employed by codefendant Sea-Land Service, Inc. in the operation of unloading the said steamer; that at the time of the occurrence codefendant Sea-Land Service, Inc. had insured its employees under the Puerto Rico Workmen's Compensation Act and plaintiff Francisco Torres Ramos applied and was awarded compensation under said Act for the injuries sustained by him in the unloading operations on board the SS DETROIT referred to in the complaint.

The Court has also been informed that the parties are in agreement as to the fact that the alleged unseaworthy condition claimed in the complaint, arose after the demise of the steamer by Beauregard, Inc. to Sea-Land Service, Inc., and was operational in connection with the

unloading of the steamer being performed by Sea Land Service, Inc.

Both parties have filed memoranda which have been carefully considered by the Court. The plaintiff concedes that Sea Land Service, Inc., being his employer, and being insured under the Workmen's Compensation Act of Puerto Rico, is relieved from liability, but he contends that Beauregard, Inc., as owner of the steamer, is liable for the alleged unseaworthiness even though it arose subsequent to the demise of the vessel, in the course of an unloading operation being performed by the demisee, who was at that time the vessel's owner *pro hac vice*. The plaintiff argues that the owner is liable to anyone entitled to the doctrine of seaworthiness at any time and that the owner has the undelegable duty to maintain the vessel in a seaworthy condition at all times and that he cannot contract away this duty by a demise of the vessel. We cannot agree with plaintiff's position in view of the factual circumstances and applicable decisions.

In *Lopez v. Bulk Shipping Company*, 163 F.2d 286, the Circuit Court of Appeals for the First Circuit held that "Certainly if under federal law a demise charter party casts the duties and responsibilities of ownership upon the charterer, under federal law it must cast upon him the duty and responsibility to see to it that the vessel is seaworthy during the term of the charter, even though it may not have been seaworthy at the time when the charter party was entered into. On this point two courts in cases in point have held the owner not liable. *In re New York Dock Co.*, 2 Cir., 51 F.2d 777; *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 64 S.Ct. 455; *Petterson v. Pacific Coast Steamship Co.*, 289 N.Y. 220, 73 N.E. 2d 536. We consider these cases correctly decided."

Opinion, p. 289.

The above holding was corrected by the Circuit Court of Appeal for the First Circuit in the case of *Rio Piedras v. Marconi Co. supra*, 290 F.2d 812, as follows:

> "In *Vito v. Balboa Shipping Co.*, 1 Cir., 1947, 163 F.2d 286, we held that an owner who has surrendered all control by demise was not liable *in personam* for unseaworthiness. Possibly we erred in extending this rule indiscriminately to cases where the unseaworthy condition preceded the demise. See *Canella v. Lykes Bros. S.S. Co.*, 2 Cir., 1949, 174 F.2d 794, 795, certiorari denied, 338 U.S. 859, 70 S. Ct. 102, 94 Led. 526. But see no reason to reconsider when, as here, the defective condition arose only after the owner had parted with all possession. See *Grillea v. United States*, supra, 229 F.2d at pages 689, 690. The judgment *in personam* against respondent must be set aside."

Opinion, p. 813-814.

Following the above decisions of the First Circuit, we must reach the conclusion that Beauregard, Inc., the vessel owner, is not liable *in personam* under the factual circumstances submitted by the parties herein, and that, therefore, defendant's motion for summary judgment should be granted and the complaint dismissed in its entirety.

The Court believes that this conclusion is strengthened by the more recent decision of the First Circuit in *Moon Steamship Company v. Pere Rodriguez*, 376 F.2d 35 (1967), involving liability for unseaworthiness under maritime law, vis a vis the exclusive remedy provided by the Workmen's Compensation Act for longshoremen working in Puerto Rican waters. In the latter decision the First Circuit reaffirmed its holding in the Ruiz Pichirilo case, supra.

Let judgment be entered dismissing the complaint in this case, with costs.

San Juan, Puerto Rico, this 25th day of April, 1968.

(s) HIRAM R. CANCIO
HIRAM R. CANCIO
Chief Judge

SUMMARY JUDGMENT

The motion of the defendants for summary judgment in the above entitled case having been granted as *per order* of this Court dated April 25, 1968;

Therefore, upon the facts and legal conclusions stated in said order, it is hereby adjudged and decreed that the plaintiff have and recover nothing by his suit; that the defendants Beauregard, Inc, and Sea-Land Service, Inc. go hence without day; and that defendants recover their costs and charges in this behalf expended, and have execution therefor.

Given at San Juan, Puerto Rico, on this 2nd day of May, 1968.

(s) HIRAM R. CANCIO
HIRAM R. CANCIO
Chief Judge

APPENDIX B

ORDER

Having considered plaintiff's "Motion under Rule 59(e) to Vacate and or to Reconsider Summary Judgment and for a Rehearing", and having also considered the memoranda filed by both parties in relation to that motion, the Court has come to the conclusion that the summary judgment entered herein on May 2, 1968 should not be disturbed.

As appears from our order of April 25, 1968, the said judgment was based on facts as to which there is no controversy, and on applicable decisions of the Circuit Court of Appeals for the First Circuit. In connection with his motion for reconsideration and rehearing, the plaintiff has not questioned the veracity of said facts and, on the other hand, while in his memorandum in support of his motion he criticizes the correctness of the decisions of the First Circuit in *Vilaró v. Balboa*, 163 F.2d 286, and *Ruiz Pichirilo v. Maysonet-Guzman*, 290 F.2d 812, however, he recognizes that this Court is bound to follow them until they are expressly reversed by the Supreme Court.

In his memorandum plaintiff states that he has filed in this Court an action *in rem* based on the same accident, and suggests that, therefore, the summary judgment in the instant action *in personam* should be set aside and that the two cases be consolidated. Aside from the fact that there is no allegation in that respect in plaintiff's motion for reconsideration and rehearing, the Court frankly does not find sufficient merit to plaintiff's suggestion, particularly in view of the doctrine established by the Circuit Court of Appeals for the First Circuit in the case of *Ruiz Pichirilo v. Maysonet Guzman* confirmed in *Alcoa v. Perez-Rodriguez*, 376 F.2d 35, concerning the unavailability of an action against the vessel independently of any personal liability of the owner.

In view of the foregoing, the Court is of the opinion that plaintiff's motion for reconsideration and rehearing should be denied, and it is so ordered.

GIVEN at San Juan, Puerto Rico, this 17th day of October, 1968.

(s) HIRAM R. CANCIO
HIRAM R. CANCIO
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Admiralty No. 331-68

FRANCISCO TORRES RAMOS,
PLAINTIFF,

v.

SS DETROIT, her boilers, engines, etc.,
DEFENDANT.

ORDER

The plaintiff herein, Francisco Torres Ramos, filed a motion for summary judgment on the issue of defendant's in rem liability, and the claimant Litton Industries Leasing Corporation filed another motion for summary judgment requesting the dismissal of the complaint with costs.

Both motions came up for hearing on January 16, 1970, and after informing the Court of their respective contentions, the parties submitted the motions for decision.

Having considered both motions in the light of the facts and stipulations as set forth in the order entered by this Court on April 25, 1968 in the case of *Francisco Torres Ramos* v. *Beauregard, Inc. and Sealand Services, Inc.*, Civil Num. 234-64, and in view of the holdings of the Circuit Court of Appeals for the First Circuit in the cases of *Vitozi* v. *Balboa Shipping Co.*, 163 F.2d. 286; *Ruiz Pichirillo* v. *Maysonet Guzman*, 290 F.2d 812; and *Alcoa Steamship Company Inc.* v. *Anton Perez Rodriguez*, 376 F.2d 35 (cert. denied, 389 U.S. 219), the Court has reached the conclusion that plaintiff's motion should be denied and it is hereby denied; and that Claimant's motion should be granted and it is hereby granted.

Let judgment be entered dismissing the complaint in this case, with costs.

San Juan, P.R., this 20th of January, 1970.

(S) HIRAM R. CANCIO
HIRAM CANCIO
Chief Judge

SUMMARY JUDGMENT

The motion of the claimant Litton Industries Leasing Corporation for summary judgment in the above-entitled case having been granted as per order of this Court dated January 19, 1970;

Therefore, on the grounds stated in said order it is hereby adjudged and decreed that the plaintiff have and recover nothing in this suit; and that the SS DERROGER, her engines, boilers, furniture, tackle, appliances, appurtenances, etc. and the claimant thereof, Litton Industries Leasing Corporation, go hence without day; and that the claimant recover its costs and charges in this behalf expended and have execution therefor.

Given at San Juan, P.R., on this 20th day of January, 1970.

(S) HIRAM R. CANCIO
HIRAM CANCIO
Chief Judge

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 7262.

FRANCISCO TORRES RAMOS,

PLAINTIFF, APPELLANT,

v.

BEAUREGARD, INC., et al.,

DEFENDANTS, APPELLEES.

and

No. 7526.

FRANCISCO TORRES RAMOS,

PLAINTIFF, APPELLANT,

v.

S. S. DETROIT,

DEFENDANT, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO.

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Gustavo A. Gelpi, with whom *Harvey B. Nachman* and *Nachman, Feldstein, Laffitte & Smith* were on brief, for appellant.

Rafael O. Fernández, with whom *Hartzell, Fernández, Nevas & Ydrach* was on brief, for appellees.

April 7, 1970.

COFFIN, *Circuit Judge*. Appellant was injured while working as a longshoreman aboard the SS Detroit, a vessel owned by appellee Beauregard, Inc. and operated by appellant's employer, Sea-Land Services, Inc. under a demise charter. He sought recovery from both Beaure-

gard and Sea-Land, alleging that his injuries were caused by the unseaworthiness of the vessel. Sea-Land moved for summary judgment on the grounds that workmen's compensation was the exclusive remedy of a Puerto Rican worker against his own employer. Beauregard also moved for summary judgment, arguing that the shipowner was not liable for conditions arising after a demise charter. Both motions were granted. Appellant then filed a libel *in rem* against the SS Detroit. This libel was subsequently dismissed because of the lack of any *in personam* claim to support a lien against the vessel.

In this court, appellant apparently concedes the correctness of summary judgment for his employer, Sea-Land. *Fonseca* v. *Prann*, 282 F.2d 153 (1st Cir. 1960), *cert. denied* 365 U.S. 860 (1961); *Alcoa Steamship Co.* v. *Perez Rodriguez*, 376 F.2d 35 (1st Cir. 1967), *cert. denied*, 389 U.S. 905 (1967). He protests, however, the dismissals of his libel *in personam* and his libel *in rem*. Recognizing that the rulings of the district court were amply supported by precedent, he urges us, however, to reexamine our holding in *Vitozi* v. *Balboa Steamship Co.*, 163 F.2d 286 (1st cir., 1947) and *Ruiz Pichirillo* v. *Maysonet Guzman*, 209 F.2d 812 (1st Cir. 1961), *rev'd on other grounds*, 369 U.S. 698 (1962) that a shipowner is not liable for unseaworthy conditions arising after he has parted with control over his vessel under a demise charter. Appellant also urges us to overturn the rule in this Circuit that no lien against a vessel arises in the absence of an *in personam* claim. *Ruiz Pichirillo* v. *Maysonet Guzman, supra; Alcoa Steamship Co.* v. *Perez Rodriguez, supra*. We decline appellant's invitation.

One who seeks to overcome the principle of *stare decisis* should be prepared to offer compelling reasons which outweigh the public interest in the stability of legal doctrine. Appellant's reasons are not of that gravity. The Supreme

Court has expressly reserved decision on both of the doctrines which appellant attacks. *Reed* v. *The Yaka*, 373 U.S. 410, 411 n. 1 (1963). It is of course true, as appellant argues, that a shipowner's duty to provide a seaworthy vessel cannot be delegated or avoided by contract. Thus a shipowner cannot escape liability by delegating partial control of his vessel to an independent contractor. *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396 (1954). But the duty to provide a seaworthy vessel is grounded in personal obligation. We would reduce this notion of personal obligation to pure fiction if we extended it to include conditions arising during a demise charter, when the owner has no right to control and no opportunity to correct defects. *Ruiz Pichirillo* v. *Maysonet Guzman*, *supra* at 815; *Accord*, *Cannella* v. *Lykes Bros. Steamship Co.*, 174 F.2d 794, 795 (2d Cir.), *cert. denied*, 338 U.S. 859 (1949); *Grillea* v. *United States*, 229 F.2d 687, 689 (2d Cir. 1956).

When neither the owner nor the demise charterer is personally liable for unseaworthiness, we see no basis for permitting a libel *in rem* against the vessel. Such a proceeding is "merely a procedural device of admiralty for more readily effectuating the liability of some jural person who has breached some personal obligation. . . ." *Reed* v. *Steamship Yaka*, 307 F.2d 203, 205 (3d Cir. 1962), *rev'd on other grounds*, 373 U.S. 410 (1963). Thus there can be no *in rem* liability absent *in personam* liability. We are aware of the contrary ruling in *Grillea* v. *United States*, 232 F.2d 919 (2d Cir. 1956), but we find that rule no more persuasive now than we did in *Ruiz Pichirillo*, *supra* at 815. In *Grillea*, Judge Learned Hand seemed to view the device of a libel *in rem* as a means of imposing a limited liability without fault on an otherwise immune shipowner. 232 F.2d at 924. However, liability without fault in ordinary legal parlance means liability without negligence; not liability

without breach of a personal obligation owed the injured party. *Cf. Skovgaard* v. *M V Tungus*, 252 F.2d 14, 17 (3d Cir. 1957), *aff'd*, 358 U.S. 588 (1959); *Compania Trasatlantica Espanola, S.A.* v. *Melendez Torres*, 358 F.2d 209, 213 (1st Cir. 1966); *Grigsby* v. *Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, 1026-29 (5th Cir. 1969). In this case, where the shipowner has breached no duty owed the injured party, he should be free of all liability, whether limited or unlimited.

Appellant also urges that the shipowner should be liable under the Civil Code of Puerto Rico, 31 L.P.R.A. § 5141. His reasoning is based on the "saving to suitors" clause, 28 U.S.C. § 1333, which permits litigants with maritime claims to seek whatever remedies are provided by common law. Under Puerto Rican law, a prime contractor can be sued for the negligence of an independent contractor in conducting work which is inherently dangerous. *Barrientos* v. *Government of the Capitol* (P.R. Sup. Ct., June 27, 1969); *see* Prosser, *Torts* § 70, p. 483 (3d ed. 1964). Therefore, appellant concludes, he should be able to sue the shipowner for faults committed by the charterer. We doubt whether the doctrine announced in *Barrientos* has any application to this case; a shipowner who parts with his vessel under a demise charter is more nearly analogous to a lessor than to a principal contractor. Moreover, appellant misconceives the meaning of the "saving to suitors" clause. Section 1333 is remedial. It provides that suitors who hold claims which may be enforced by a libel *in personam* may also bring suit in a common law court. Black & Gilmore, *The Law of Admiralty* § 1-13. If, however, the claim fails under the law of admiralty, it cannot be revived by invoking local law. *Chelentis* v. *Luckenbach Steamship Co.*, 247 U.S. 372, 384 (1918); *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 407, 408-411 (1953); *Jansson* v. *Swedish American Line*, 185 F.2d 212, 216-217 (1st Cir. 1950).

We have considered appellant's constitutional claims, and find them to be without merit.

Affirmed.

APPENDIX E

COMPLAINT

Plaintiff, complaining of the defendant, by his attorneys, NACHMAN & FELDSTEIN, respectfully sets forth and alleges:

For A First Claim For Relief:

FIRST: That at all the times hereinafter mentioned, the plaintiff was and still is a citizen and resident of the United States of America and the Commonwealth of Puerto Rico.

SECOND: That at all the times hereinafter mentioned, the defendant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of doing business outside the Commonwealth of Puerto Rico.

THIRD: This Honorable Court has jurisdiction over the parties and subject matter pursuant to 28 United States Code, 1332, because of the diversity of citizenship and because the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

FOURTH: Upon information and belief and at all the times hereinafter mentioned, the defendant, SEA LAND SERVICE, INC., owned a certain vessel, the SS DETROIT.

FIFTH: Upon information and belief and at all the times hereinafter mentioned, the defendant, SEA LAND SERVICE, INC., operated, managed, controlled, provisioned, manned, supplied and was in possession and control of the said vessel, SS DETROIT.

SIXTH: That on or about the 5th day of August, 1963, the said vessel, SS DETROIT, was in the port of San Juan, Puerto Rico.

SEVENTH: That on or about the 5th day of August,

1963, the plaintiff was an employee of an independent stevedoring contractor in the capacity of longshoreman and as such was lawfully aboard the vessel, SS DETROIT, performing certain work in connection with the movement and handling of the cargo of the said vessel.

EIGHTH: That at all times the defendant, its agents, servants and/or employees were under a duty to provide the plaintiff with a safe and seaworthy vessel, appliances and appurtenances, equipment and crew; to supply the plaintiff with a safe place to work and was also under a duty to use reasonable care to prevent the plaintiff from being injured.

NINTH: That on or about the 5th day of August, 1963, while plaintiff was lawfully aboard said vessel, he was caused to be injured when he was precipitated from the deck of a launch being carried as deck cargo on to the main deck of the vessel.

TENTH: The aforesaid occurrence and resulting injuries to plaintiff were directly caused by the carelessness and negligence of the defendant, its agents, servants and or employees in failing to supply the plaintiff with a safe and seaworthy vessel, appliances and crew; in failing to provide the plaintiff with a safe place to work; in failing to provide the proper equipment to perform the discharging operations; in failing to provide ladders or other devices to permit longshoremen to unfasten the turnbuckles which were securing the cables holding the desk cargo; in failing to cover the deck cargo; in applying fishoil or other slippery substees to the surface of the deck-cargo; in failing to properly supervise the discharge of the deck cargo; in failing to warn the plaintiff of the dangerous condition and in otherwise failing to warn the plaintiff of the dangerous condition and in otherwise failing to exercise due care and caution to prevent the happening of the occurrence.

ELEVENTH: That by reason of the aforesaid, plaintiff has been rendered sick, sore, lame and disabled, has suffered and is continuing and will continue to suffer great pain and mental anguish; has been prevented from attending to his usual duties or vocation, resulting in a loss of earnings thereby; has been obliged to undergo hospital and medical care and attention and upon information and belief, the aforesaid injuries may be permanent in character and said loss of earnings may continue indefinitely.

TWELFTH: That by reason of the aforesaid, the plaintiff has been damaged in the sum of FIFTY THOUSAND DOLLARS ($50,000.00)

For A Second Claim For Relief:

THIRTEENTH: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs FIRST through SEVENTH, NINTH and ELEVENTH of the complaint, with the same force and effect as if set forth at length herein.

FOURTEENTH: That it was the duty of the defendant, its agents, servants and or employees to provide plaintiff with a seaworthy and safe vessel, appliances and crew and to keep same in a seaworthy condition.

FIFTEENTH: That the aforesaid injuries sustained by the plaintiff were directly caused by the failure of the defendant, its agents, servants and or employees to provide a seaworthy, safe vessel, appliances and crew and to keep same in a seaworthy condition.

SIXTEENTH: That by reason of the failure of the defendant, its agents, servants and or employees to provide a seaworthy, safe vessel, appliances and crew, plaintiff has been damaged in the sum of FIFTY THOUSAND DOLLARS ($50,000.00).

WHEREFORE, plaintiff demands judgment against the defendant in the sum of FIFTY THOUSAND DOLLARS ($50,000.00) on the First Claim for Relief and the sum

of FIFTY THOUSAND DOLLARS ($50,000.00) on the Second Claim for Relief, together with the costs and disbursements of this action.

San Juan, Puerto Rico, May 25, 1964.

NACHMAN & FELDSTEIN
Attorneys for Plaintiff
P. O. Box 2407
San Juan, P. R. 00903
(s) HARVEY B. NACHMAN
Harvey B. Nachman

APPENDIX F

AMENDED COMPLAINT

Plaintiff, complaining of the defendants, by his attorneys, NACHMAN & FELDSTEIN, respectfully sets forth and alleges:

For A First Claim For Relief:

FIRST: That at all the times hereinafter mentioned the plaintiff was and still is a citizen and resident of the United States of America and the Commonwealth of Puerto Rico.

SECOND: That at all the times hereinafter mentioned, both defendants were and still are corporations duly organized and existing under and by virtue of the laws of the State of Delaware, with their principal place of doing business outside the Commonwealth of Puerto Rico.

THIRD: This Honorable Court has jurisdiction over the parties and subject matter pursuant to 28 United States Code, 1332, because of the diversity of citizenship and because the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

FOURTH: Upon information and belief and at all the times hereinafter mentioned, the defendant, BEAUREGARD, INC., owned a certain vessel, the SS DETROIT.

FIFTH: Upon information said belief and at all the times hereinafter mentioned, the defendant, SEA LAND SERVICE, INC., operated, managed, controlled, provisioned, manned, supplied and was in possession and control of the said vessel, SS DETROIT.

SIXTH: That on or about the 5th day of August, 1963, the said vessel, SS DETROIT, was in the port of San Juan, Puerto Rico.

SEVENTH: That on or about the 5th day of August, 1963, the plaintiff was an employee of an independent

stevedoring contractor in the capacity of longshoreman and as such was lawfully aboard the vessel, SS DETROIT, performing certain work in connection with the movement and handling of the cargo of the said vessel.

EIGHTH: That at all times the defendants, their agents, servants and or employees were under a duty to provide the plaintiff with a safe and seaworthy vessel, appliances and appurtenances, equipment and crew; to supply the plaintiff with a safe place to work and were also under a duty to use reasonable care to prevent the plaintiff from being injured.

NINTH: That on or about the 5th day of August, 1963, while plaintiff was lawfully aboard said vessel, he was caused to be injured when he was precipitated from the deck of a launch being carried as deck cargo on to the main deck of the vessel.

TENTH: The aforesaid occurrence and resulting injuries to plaintiff were directly caused by the carelessness and negligence of the defendants, their agents, servants and or employees in failing to supply the plaintiff with a safe and seaworthy vessel, appliances and crew; in failing to provide the plaintiff with a safe place to work; in failing to provide the proper equipment to perform the discharging operations; in failing to provide ladders or other devices to permit longshoremen to unfasten the turnbuckles which were securing the cables holding the deck cargo; in failing to cover the deck cargo; in applying fishoil or other slippery substances to the surface of the deck cargo; in failing to properly supervise the discharge of the deck cargo; in failing to warn the plaintiff of the dangerous condition and in otherwise failing to exercise due care and caution to prevent the happening of the occurrence.

ELEVENTH: That by reason of the aforesaid, plaintiff has been rendered sick, sore, lame and disabled, has

suffered and is continuing and will continue to suffer great pain and mental anguish; has been prevented from attending to his usual duties or vocation, resulting in a loss of earnings thereby; has been obliged to undergo hospital and medical care and attention and upon information and belief, the aforesaid injuries may be permanent in character and said loss of earnings may continue indefinitely.

TWELFTH: That by reason of the aforesaid, the plaintiff has been damaged in the sum of FIFTY THOUSAND DOLLARS ($50,000.00).

For A Second Claim For Relief:

THIRTEENTH: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs FIRST through SEVENTH, NINTH and ELEVENTH of this complaint, with the same force and effect as if set forth at length herein.

FOURTEENTH: That it was the duty of the defendants, their agents, servants and/or employees, to provide plaintiff with a seaworthy and safe vessel, appliances and crew and to keep same in a seaworthy condition.

FIFTEENTH: That the aforesaid injuries sustained by the plaintiff were directly caused by the failure of the defendants, their agents, servants and or employees to provide a seaworthy, safe vessel, appliances and crew and to keep same in a seaworthy condition.

SIXTEENTH: That by reason of the failure of the defendants, their agents, servants and or employees to provide a seaworthy, safe vessel, appliances and crew, plaintiff has been damaged in the sum of FIFTY THOUSAND DOLLARS ($50,000.00).

WHEREFORE, plaintiff demands judgment against the defendants in the sum of FIFTY THOUSAND DOLLARS ($50,000.00) on the First Claim for Relief and the sum of FIFTY THOUSAND DOLLARS ($50,000.00) on the Sec-

ond Claim for Relief, together with the costs and disbursements of this action.

San Juan, Puerto Rico, December 31, 1964.

NACHMAN & FELDSTEIN
Attorneys for Plaintiff
P. O. Box 2407
San Juan, Puerto Rico
(s) HARVEY B. NACHMAN
Harvey B. Nachman

APPENDIX G

ANSWER TO AMENDED COMPLAINT

Beauregard, Inc. and Sea-Land Service, Inc., by their undersigned attorneys, answering the Amended Complaint of Francisco Torres Ramos, allege upon information and belief as follows:

As To The Alleged First Claim For Relief

1. They admit the allegations set forth in paragraphs FIRST, SECOND, FOURTH, FIFTH and SIXTH.

2. They deny the allegations set forth in paragraphs THIRD, EIGHTH, TENTH, ELEVENTH and TWELFTH.

3. They admit that on or about August 5, 1963 the plaintiff was employed by Sea-Land Service, Inc. in the capacity of longshoreman and as such was lawfully aboard the vessel SS "DETROIT" performing certain work in connection with the movement and handling of the cargo of the said vessel. Except as so admitted defendants deny the other allegations set forth in paragraph SEVENTH.

4. They admit that on or about the fifth day of August, 1963, while the plaintiff was lawfully aboard the SS "DETROIT", he was injured. Except as so admitted, defendants deny knowledge or information sufficient to form a belief as to the other allegations set forth in paragraph NINTH.

As To The Alleged Claim For Relief

5. Defendants, repeat, reiterate and reallege each and every answer and denial contained in their answer to the alleged First Claim for Relief, with the same force and effect as if set forth at length herein.

6. They deny the allegations set forth in paragraphs FOURTEENTH, FIFTEENTH and SIXTEENTH.

Affirmative Defenses

7. If the plaintiff sustained any injuries and or illnesses, as alleged in the complaint, then said injuries and or illnesses were caused in whole or in part by the plaintiff's own negligence without any fault, neglect or breach of warranty or of seaworthiness on the part of the defendants contributing thereto.

8. At the time of the happening of the events referred to in the complaint, defendant Sea-Land Service, Inc. was in possession and control of the SS "DETROIT" by virtue of a Demise Charter executed on April 30, 1963 under the terms of which defendant Beauregard, Inc. surrendered entire control and possession of said vessel and consequent control over its navigation to defendant Sea-Land Service, Inc.

9. At the time of the happening of the events referred to in the complaint, the plaintiff was employed by defendant Sea-Land Service, Inc. as a longshoreman aboard the SS "DETROIT" in the port of San Juan, on navigable waters within the territorial limits of Puerto Rico.

10. At the time of the happening of the events referred to in the complaint, defendant Sea-Land Service, Inc. had insured its employees in accordance with, and hence was covered by, the Puerto Rico Workmen's Compensation Act and the plaintiff applied for and was awarded compensation under said Act for the injuries allegedly sustained by him. The number of the case in the State Insurance Fund is 2R-7589.

11. The plaintiff's only remedy is to obtain compensation under the Puerto Rico Workmen's Compensation Act.

12. The plaintiff is barred from bringing this action.

WHEREFORE, defendants pray that the complaint be dismissed with costs to the defendants as against the plaintiff, and such other, further and different relief as the justice of the cause may require.

San Juan, Puerto Rico, January 19, 1965.

HARTZELL, FERNANDEZ & NOVAS

By (s) A. M. BIRD

Attorneys for the Defendants

9th Floor Banco Popular Building

P. O. Box 392

San Juan, P. R. 00902

APPENDIX H

MOTION FOR SUMMARY JUDGMENT

Now come the defendants in the above entitled action, through their undersigned attorneys, and respectfully state:

1. That according to the allegations of the amended complaint herein, the damages claimed arose out of bodily injuries sustained by the plaintiff while working on board the SS DETROIT in the port of San Juan, Puerto Rico.

2. That on the date of the accident the SS DETROIT was operated, managed and manned and was then in possession and control of defendant Sea-Land Service, Inc. under a Demise Charter entered into and executed between said owner Beauregard, Inc. and Sea-Land Service, Inc. as charterer, pursuant to which the latter was the owner of the SS DETROIT *pro hac vice*.

3. That the plaintiff has admitted the following facts as appears from "Request for Admission of Facts" filed herein on September 14, 1967 and served on plaintiff's attorneys on September 15, 1967:

a) At the time of the happening of the events referred to in the complaint, the plaintiff Francisco Torres Ramos, was employed by defendant Sea-Land Service, Inc. as a longshoreman aboard the SS DETROIT in the port of San Juan, Puerto Rico.

b) At the time of the happening of the events referred to in the complaint, defendant Sea Land Service, Inc. had insured its employees under the Puerto Rico Workmen's Compensation Act.

c) The plaintiff, Francisco Torres Ramos, applied for and was awarded workmen's compensation under the Puerto Rico Workmen's Compensation Act for the injuries sustained by him on board the SS DETROIT referred to in the complaint.

4. That in view of all the allegations and facts hereinabove set forth and the decisions hereinafter cited, the plaintiff has no right of action against any one of the defendants.

Vilozi v. *Balboa Shipping Co.*, (First Circuit) 163 F.2d 286.

Pichirilo v. *Guzman*, (First Circuit) 290 F.2d 812.

Alcoa SS. Co. v. *Perez-Rodriguez*, (First Circuit) 376 F.2d 35.

WHEREFORE, defendants pray that a summary judgment be entered in this case dismissing the complaint, with costs and attorneys fees in favor of the defendants.

San Juan, Puerto Rio, February 6, 1968.

HARTZEL, FERNANDEZ, NOYAS & YDRACH

(s) RAFAEL O. FERNANDEZ

Rafael O. Fernandez

Attorneys for the Defendants

Suite 1530-Banco Popular Center

Hato Rey, Puerto Rico

P. O. Box 392

San Juan, Puerto Rico 00902

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF PUERTO RICO

Admiralty No. 331-68

FRANCISCO TORRES RAMOS,
DEFENDANT,
v.
SS DETROIT, *her engines, boilers, furniture,* tackle, appliances, appurtenances, etc.,
PLAINTIFF.

COMPLAINT

TO THE HONORABLE, THE JUDGE OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

The Plaintiff for his complaint alleges:

FIRST: That at all times herein mentioned, the Plaintiff was and is a citizen and resident of the United States of America and the Commonwealth of Puerto Rico.

SECOND: The SS DETROIT is now or during the pendency of process herein will be, within the jurisdiction of this Honorable Court.

THIRD: That on or about the 5th day of August, 1966, the Defendant vessel, SS DETROIT, was in port in the bay of San Juan, Puerto Rico.

FOURTH: That on or about the 5th day of August, 1963, the Plaintiff was aboard the Defendant vessel performing certain work in connection with the movement and handling of the cargo of said vessel which has been traditionally performed by seamen.

FIFTH: That at all times herein mentioned, the Defendant vessel was under a duty to be in a safe and sea-

worthy condition with safe and seaworthy appliances, appurtenances, equipment and crew and to be maintained in said condition.

SIXTH: That on or about the 5th day of August, 1963, the Plaintiff, while performing certain work in connection with the movement and handling of cargo aboard said vessel and while he was conducting himself in a proper manner and was not violating any laws or regulations, he was caused to be injured when he was precipitated from the deck of a launch being carried as deck cargo on to the main deck of the vessel.

SEVENTH: The aforesaid occurrence and resulting injuries to Plaintiff were directly caused by the carelessness and negligence of the defendant, its agents, servants and or employees in failing to supply the plaintiff with a safe and seaworthy vessel, appliances and crew; in failing to provide the plaintiff with a safe place to work; in failing to provide the proper equipment to perform the discharging operations; in failing to provide ladders or other devices to permit longshoremen to unfasten the turnbuckles which were securing the cables holding the deck cargo; in failing to cover the deck cargo; in applying fishoil or other slippery substances to the surface of the deck-cargo; in failing to properly supervise the discharge of the deck cargo; in failing to warn the plaintiff of the dangerous condition and in otherwise failing to exercise due care and caution to prevent the happening of the occurrence.

EIGHTH: The defendant breached its duty and warranty to provide a seaworthy vessel.

NINTH: That by reason of the aforesaid, the plaintiff has been rendered sick, sore, lame and disabled, has suffered and is continuing and will continue to suffer great pain and mental anguish, has been prevented from attending to his usual duties or vocation, resulting in a loss of

earnings thereby; has been obliged to undergo hospital and medical care and attention and upon information and belief, the aforesaid injuries may be permanent in character and said loss of earnings may continue indefinitely.

TENTH: All the singular, the premises are true and within the admiralty and maritime jurisdiction of the United States and his Honorable Court.

ELEVENTH: That by reason of the aforesaid, the plaintiff has been damaged in the sum of FIFTY THOUSAND DOLLARS ($50,000.00).

WHEREFORE, plaintiff prays:

1.—That process *in rem* may issue in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction against the vessel SS DETROIT, her engines, boilers, tackle, furniture, appliances, appurtenances, etc. and that all persons having or claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid.

2.—That this Honorable Court may be pleased to decree to the plaintiff his damages with interest and costs and that the said vessel, SS DETROIT, her engines, boilers, furniture, tackle, appliances, appurtenances etc. may be condemned and sold to pay the same, and that the plaintiff may recover his damages from said defendant.

3.—That the paintiff may have such other and further relief in the premises as in law and justice he may be entitled to receive.

San Juan, P. R., May 21st, 1968.

NACHMAN, FELDSTEIN, LAFFITTE & SMITH
Attorneys for Plaintiff
P. O. Box 2407
San Juan, P. R. 00903
(s) HARVEY B. NACHMAN
Harvey B. Nachman

Verification

FRANCISCO TORRES RAMOS, being duly sworn, deposes and says:

That he is of legal age, married, longshoreman, the plaintiff herein and resident of San Juan, Puerto Rico.

That the complaint has been read and translated to him, and that the facts contained therein are true to his knowledge, except as to those matters alleged upon information and belief, and as to those matters he believes them to be true.

San Juan, Puerto Rico, May 17, 1968.

(s) Francisco Torres Ramos
Francisco Torres Ramos

Commonwealth of Puerto Rico
City of San Juan) SS.:

[Seal]

Affidavit No. 163 (copy)

SWORN TO and SUBSCRIBED before me by Francisco Torres Ramos, of the personal circumstances above mentioned, to me personally known and known to me to be the person who executed the preceding affidavit, in San Juan, Puerto Rico, this 17 day of May, 1968.

(s) Salvador Autmulth
Salvador Autmulth
Notary Public.

APPENDIX J

IN THE SUPREME COURT OF PUERTO RICO

Ramonita Barrientos, et al.,
Plaintiffs-appellees
v.
Government of the Capital, et al., — R-62-61, 156
Defendants-appellees — Review
Island Constructors, Inc., et al.,
Defendants-appellants
Carmen J. Martinez Cancel, et al.,
Plaintiffs-appellants
v.
Government of the Capital, et al., — R-62-67
Defendants-appellees — Review
Joaquin Valdivieso Llompart, et al.,
Plaintiffs-appellants
v.
Nolla, Galib y Co., et al., — R-62-68
Defendants-appellees — Review
Cesar Maldonado, et al.,
Plaintiffs-appellants
v.
Government of the Capital, et al., — R-62-69
Defendants-appellees — Review
Leon Lyons and Auris M. Girona,
Plaintiffs-appellees
v.
Government of the Capital, et al., — R-64-188
Defendants-appellees — Review
Island Constructors, Inc., et al.,
Defendants-appellants
Conjugal Partnership constituted
by Heriberto Berly and Julia Colon,
Plaintiffs-appellees

v.

Nolla, Galib y Co., et al., Defendants-appellees
Island Constructors, Inc., et al., Defendants-appellants

R-64-214
Review

Mr. Justice Torres Rigual delivered the opinion of the Court.

San Juan, Puerto Rico, June 27, 1969

THE FACTS

Around the beginning of 1957 the Municipality of San Juan contracted with Nolla, Galib y Co., after public bidding held for that purpose, for the construction of a sewerage system and a pump house in the section of Ocean Park in Santurce in the amount of $433,241.48. Nolla y Galib subcontracted with appellant, Island Constructors, Inc., the performance of that part of the contract concerning the installation of the storm-water sewer for the sum of $199,322.60, leaving for itself the construction of the pump house. The municipality approved this subcontract.

As it is usual in these kind of transactions, the contractor as well as the subcontractor secured the faithful performance of the contract and the payment of materials and labor. They also obtained liability policies to answer for the damages which might be caused in the execution of the work.

The contract required a dry-pipe system about eight feet deep. The drawings indicated that the ground-water level in that section was at a distance of about two feet from the surface of the street. They also showed that the subsoil was composed of a peat stratum which fluctuated between six and eight feet and another inferior stratum composed of fine sand up to a depth of about 21 to 23 feet. The consistency of this subsoil was very properly

described by the resident engineer of the municipality as *unsafe*.

In order to perform the installation of the dry-pipe system, Island Constructors, Inc. tried to use the system of well points for the purpose of extracting the water from the subsoil. It installed a line of about 120 well points, at an approximate depth of ten feet along Cacique Street from its intersection at Santa Ana Street to its intersection at Santa Cecilia Street.

On Saturday, March 30, 1957, Island Constructors, Inc. carried out a test of this system which lasted between two and four hours. Said test reduced the ground-water level in such a manner that it brought about a settlement of the ground in an area of about 1,000 feet. As a result of the settlement cracks appeared immediately on sidewalks, walls, fences, and the sinking of floors in the neighborhood was produced. Subsequently, similar damages began to appear in the properties located within that area.

In view of the occurrence, and following instructions of the inspectors of the municipality, Island Constructors, Inc. stopped the works, resuming them at the request of the surety, American Surety Co., which feared the confiscation of the bond.[1]

Finally, Island Constructors, Inc. abandoned the performance of the work, its surety, American Surety Co., undertaking its continuation on the basis of a stipulation agreed upon with Nolla, Galib y Co. as part of a lawsuit which the latter had brought for the specific performance of the subcontract.[2]

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[1] We need not relate the incidents concerning the suspension and resuming of the work, as well as the adoption of a new method for the installation of the pipes and the change of the system of well points to that of extracting water by pumping from open cut, since they do not alter in any manner whatsoever the adjudication of liability in the case.

[2] Civil Case Nos. 57 and 6515 filed in the Superior Court, San

The foregoing facts gave rise to an extensive and complex litigation which culminated in the judgment object of the petitions for review above mentioned. Said judgment sustained the complaint against appellants, Island Constructors, Inc. and its surety, American Surety Co. of New York; dismissed the complaint as to defendants Nolla, Galib y Co., Government of the Capital, U. S. Casualty Co., Pedro Tejada, and P. J. Tejada Associates. The judgment also dismissed the cross claim brought by the Government of the Capital against Nolla, Galib y Co., and Island Constructors, Inc., as well as the complaint against third party filed by Island Constructors, Inc. against Gabriel Fuentes.[1]

For the purposes of facilitating the discussions of the different and complex questions raised in said petitions for review, we shall group the assignments of errors related among themselves, and thus grouped, we shall discuss them.

I

ASSIGNMENTS OF ERRORS CONCERNING THE DETERMINATION OF NEGLIGENCE AND CAUSE OF DAMAGES[2]

The fundamental finding of the trial court concerning this question was in synthesis that the damages were due exclusively to the deficient operation of the system of well points by Island Constructors, Inc. inasmuch as the

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Joan Rats by Nolla, Galib y Co. against Island Constructors, Inc. and American Surety Co.

The judgment disposed of 32 consolidated cases. The six petitions for review above mentioned were filed against it. Petitions Nos. 62-61, 62-156, 64-214, and 64-188 filed by Island Constructors, Inc. and American Surety Co. comprise identical assignments of errors. Petitions Nos. 62-61 and 62-156 were consolidated at appellants' request. Petitions Nos. 62-67 and 62-69 filed by Carmen Martinez Cancel, et al., and Cesar Martinez Maldonado, et al., respectively, comprise similar assignments of errors.

These are assignments a and b of petitions Nos. 62-61 and 62-156, and assignments b and c of petitions Nos. 64-214 and 64-188.

latter being aware of the nature of the subsoil did not take the necessary measures to prevent the damages: to wit, installation of the well points within sheet piling duly sealed and the control of the pumping to prevent the displacement of great amounts of water from the subsoil.

Appellants, Leland Constructors, Inc. and American Surety Co. challenge said finding on the ground that the same does not represent the most rational, just and juridical balance of the evidence received. They argue that "the settlement was the natural consequence of having lowered the ground water level in order to install the drainage pipe system, as required by the specifications of the contract; that such settlement would have occurred irrespective of the method used for the extraction of water or the adequate manner of performing this work according to the specifications; and that the use of sealed sheet piling for the purpose prescribed in the specification—to prevent the collapse of the sides of the excavations—would not have prevented the descent of the ground water level nor of the settlement of adjacent lands."

From the foregoing they conclude that the damages were the direct and necessary result of the works performed for the construction of the storm-water sewer and that, therefore, the Government of the Capital is the liable entity.

The evidence introduced with respect to the causes of the damages consisted mainly of expert testimony,[5] the same being extremely technical and conflicting. The trial court settled the conflict and gave entire credit to the expert of Nolla, Galib y Co. The careful and repeated reading we have made of the voluminous record—10 pieces of evidence with over 3,000 pages—convinces us that the trial court acted within its discretion in settling the conflict in the manner it did and that we should not disturb these

[5] The court heard the testimony of five experts.

findings on appeal because the same are amply supported by the evidence presented.

II

ASSIGNMENTS CONCERNING THE EXEMPTION OF THE GOVERNMENT OF THE CAPITAL FROM LIABILITY[6]

The trial court concluded the following on this question:

a) that the work required for the construction of the sewerage was not inherently dangerous because it was a question of engineering works ordinarily performed;

b) that said works did not require extraordinary precautions in order to prevent injury; since by the adequate use of any acceptable method to extract water from the ground, damages to neighboring buildings could not be foreseen; and,

c) that because of its inherent nature the work did not have to cause or produce risks of injury.

With respect to the foregoing findings, and as a matter of law, the trial court concluded that the relations between Nolla, Galib y Co. and Island Constructors, Inc. were those of an independent contractor and subcontractor and that, therefore, Nolla, Galib y Co. was not liable for the damages caused by Island Constructors, Inc. particularly when a work inherently dangerous was not involved. The court used this same reasoning to exempt the Government of the Capital from liability.

Appellants maintain that as a result of the conditions and nature of the subsoil, the works were inherently dangerous for which reason the Government of the Capital was barred from delegating its duty by a relation of principal and independent contractor. We agree with this position and shall immediately turn to set forth the reasons

[6] It covers the assignments of petitions Nos. 62-67 and 62-69.

which justify the modification of the judgment rendered by the trial court.

In general terms, an owner is not held liable for the negligent acts of an independent contractor. *Moreani v. Christa*, 73 P.R.R. 729 (1952). The case law, however, has established so many and different exceptions to this general principle of nonliability that some commentators as *Prosser* doubt its validity. PROSSER: *Law of Torts*, 483-486 (Hornbook Series, 1964).[7]

The doctrine of the inherent danger invoked by appellants in order to impose liability upon the Government of the Capital and Nollo, Galib y Co., is one of the numerous exceptions to the general rule of nonliability. By virtue thereof, the owner is liable for the negligence of an independent contractor in the construction of a work which is inherently or intrinsically dangerous. PROSSER *supra*, 483; *Shelton Employers Liability for Negligence of His Independent Contractors*, 30 Tenn. L. Rev. 439; *Annot: Non-Delegable Duty of Employer With Respect to Work Which is Inherently Or Intrinsically Dangerous*, 23 A.L.R. 1084. This exception is closely connected with another which also imposes liability upon the principal for the negligence of the contractor not only when the work is inherently or intrinsically dangerous, but also when a work, which in the natural course of events produces injury, unless special precautions are taken, is involved. This exception originated in England in the case of *Bower v. Peate*, L.R.I.Q.B. Div. Engl. (1876), is being stated in the

[7] In the introductory notes to § 409 of *Restatement of the Law of Torts* (2d) at p. 370 it is said that the exceptions to this general rule are so numerous that "it can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it." In *Pacific Fire Ins. Co. v. Kenney Boiler & Mfg. Co.*, 201 Minn. 500, 277 N.W. 226 (1937), cited in said introductory note, it was also stated:

"Indeed it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions."

following words:

> "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else, whether it be the contractor employed to do the work from which the danger arises, or some independent person, to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

In the United States this exception has been applied with a similar language, although not as clear and precise, in *Chicago* v. *Robbins*, 2 Black (U.S.) 418.

Both exceptions, that of the inherent danger and that of *Bower* v. *Peate*, *supra*, are so closely connected that they may be considered not as separate and independent doctrines, but as part of the same rule of primary, non-delegable liability of the owner for the negligent acts of an independent contractor. See *Annot.: Non-Delegable Duty Of Employer In Respect Of Work Which Will In Ordinary Course Of Events Produce Injury, Unless Precautions Are Taken*, 23 A.L.R. 1016; *Annot.: Rylands v. Fletcher Rule As Applicable To Injury Or Death Of Person As Result Of Excavation And Re*[illegible], 33 A.L.R.2d 7. *Prosser* considers them both as an exception to the general rule and he discusses it in his treatise on torts, *Prosser*, *supra*, 485. Logically, the rule is certainly included in the other since any work which is inherently or intrinsically dangerous, on account of its own condition, falls within the more embracive [illegible] *Bower* v. *Peate*, *supra*, which refers to

work which ordinarily may cause injury unless special precaution are taken. In practice both exception have been indistinctly used by the lower court in order to reach the same result: *Restatement of the Law of Torts, supra*, 390. The *Restatement* adopt both doctrine [illegible] 416 and 427 stating that both have been applied interchangeably in different cases and even in the same case. The foregoing convince us that we may adopt in our jurisdiction the accurate and comprehensive formula of *Bower v. Peate* which impose liability upon the owner for the negligent acts of the contractor in the performance of a work which in the natural course of event might cause injury unless precaution are taken.

Under the most comprehensive doctrine which we defend herein it is not required that the injury be a *necessary* and *direct* result of the stipulated work as we held in *Mariani v. Christy, supra*, and repeated in *Bisaat v. Municipality of Barceloneta*, 87 P.R.R. 74 (1963). In said case we applied the restrictive concept of the doctrine of inherent risk, stating that the damages must come from "the direct and necessary result of the stipulated work

[illegible]

[illegible]

[illegible]

that is, if the work to be done cannot be done without danger or injury to third parties and if its very nature and existence are such as to cause or produce danger or injuries." The rule of liability of the principal being conceived in such a narrow manner, its application has no substantial virtuality and is altogether superfluous. It is elemental in our law that a person who orders another, whether as independent contractor or as a mere employee, to execute an act which necessarily is going to cause injury, is liable for his own culpable act of ordering. They are clear cases of fault which fall under the provisions of Art. 1802 of the Civil Code, it being unnecessary to draft special doctrines of liability as we did in *Mariani* v. *Christy*, supra."

On the other hand, the works which necessarily cause harm because of their inherent nature are certainly very exceptional. Even those usually acknowledged as dangerous, electricity and dynamite, can be utilized without any risk by competent persons qualified to handle them. All of which shows the need of considering always the circumstances which surround the performance of the work and not only the work per se.

The restrictive concept that the harm is the necessary consequence of the performance of the work having been eliminated, it suffices, then, in order to hold the owner liable, that there be a recognizable risk, a harm which can be foreseen. It is not necessary that the risk of causing harm be serious or inevitable. It is sufficient that from the specific circumstances which surround the performance of the work, the existence of a risk which requires that precautions be taken may reasonably be recognized. The precautions need not be of an extraordinary nature either.

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[9] *Mariani* v. *Christy*, *supra*, dealt with the performance of a work by an independent contractor, which implied a trespass upon another's property.

In *Bonet v. Municipality of Barceloneta* we stressed these essential elements of the owner's liability. Nevertheless, we decided the case on the basis of the restrictive concept of the harm which we disregard here. As a matter of fact we are not saying anything new. The element of foreseeability of risk mentioned herein is the same element of foreseeability which is consubstantial to all the doctrine of civil liability provided in 1802 of the Civil Code.[10]

It is proper now to apply the principles previously enumerated to the instant case. The trial court elaborated its determination, as we already know, on the following grounds:

> a) That the work required for the construction of the sewerage was not inherently dangerous because it was a question of engineering works ordinarily performed;
>
> b) That said works did not require extraordinary precautions to prevent injury; and
>
> c) That because of its inherent nature the works did not have to cause or produce risks of injury.

It is immediately noted that the criteria utilized by the trial court are the restrictive views of the need of the injury which we reject herein.

It is beyond discussion that the construction of a storm-water sewer is a common and ordinary engineering work which usually should not anticipate damages. The same thing can be said of other engineering works as the construction of a street, or of a dwelling building, or of a park. The anticipation of the risk and of special precautions do not depend, as we have said, on the nature of the work, but on the *circumstances* which surround its performance. In the case at bar the circumstances established by the

---

[10] Except, of course, those exceptional cases where objective liability may be applied.

evidence and on which there is no discussion were the following:

a) The contract for the installation of the piping for the storm water sewage required a dry pipe system about eight feet deep.

b) The drawings indicated with crystal clearness "as if they had a photograph of the subsoil" [11] that the ground water level in the section where the piping was to be installed was at a distance of about two feet from the surface of the street.

c) The drawings also showed that the subsoil was composed of a peat stratum which fluctuated between six and eight feet and another inferior stratum composed of fine sand up to a depth of about twenty-one to twenty-three feet.

Moreover, the following is inferred from the evidence presented:

a) The Government of the Capital had knowledge of the nature of the subsoil not only because of the drawing but because formerly some sinkings had occurred in some streets of Ocean Park which required the reinforcement of the sidewalks.[12]

b) Engineer Efraín Muratti in describing the subsoil said that "I am surprised to know that in that area there are six or seven of peat and that no disaster has occurred."[13]

c) The system of well points for the extraction of water requires special precautions which were not taken in this case, as we saw upon discussing the first part of this opinion.

[11] Engineer Capanegro's testimony. Tr. of Ev. Vol. 5: p. 19.
[12] Engineer Tejada's testimony. Tr. of Ev. Vol. 2, pp. 201 and 207.
[13] Engineer Efraín Muratti's testimony. Tr. of Ev. Vol. 3, p. 207.

In view of the foregoing, we are constrained to conclude that the construction of the storm water sewer in the section of Ocean Park constituted a work in the course of which any person would have reasonably foreseen the risks of causing damages unless precautions were taken. The fundamental elements of liability—peculiar risk and special precautions—clearly appeared from all the foregoing circumstances. Therefore, the Government of the Capital was not free from liability in contracting for the performance of the work with an independent contractor. Its liability is of a primary character, non-delegable before the plaintiffs. It is liable not because of its negligence but because of the nature of the work. On the other hand, since the damages were caused by the negligence of the independent contractor, Island Constructors, Inc., upon operating deficiently the system of well points, the latter is liable for its own negligence to plaintiffs. It is also held liable to the Government of the Capital for everything that the latter shall be bound to pay, by virtue of the subcontract with Nolla, Galib y Co. by which it assumed all the obligations of the latter toward the former.[14]

Consistent with the foregoing, we conclude that the trial court erred in dismissing the complaint against the Government of the Capital.

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[14] Section 4 of the subcontract between Nolla, Galib y Co. and Island Constructors, Inc., read as follows:

"Section 4. The Subcontractor declares that he has thoroughly examined the drawings and specifications governing the work embraced in the above mentioned contract between the Owner and the Contractor, of which the work covered by this agreement is a part, *and he hereby agrees to assume toward the Contractor all the obligations and responsibilities which the Contractor has assumed toward the Owner under said Contract between the Owner and the Contractor so far as they apply to the part of the work covered by this agreement.* (Italics ours.)

— III —

ASSIGNMENTS OF ERRORS CONCERNING THE SCOPE OF AMERICAN SURETY CO.'S LIABILITY UNDER THE PUBLIC LIABILITY POLICIES AND UNDER THE PERFORMANCE BONDS[15]

1. The public liability policy executed by American Surety Co. covers only damages caused as a result of accidents. On the ground of this limitation, appellant, American Surety Co., elaborates the argument that the damages were not the result of an accident, inasmuch as "it was not only foreseeable but that it was advertently anticipated that no substantial damages would be caused to the other properties belonging to plaintiff's such as in effect happened as the work was subsequently continued." We do do not agree.

In its common and ordinary meaning, which is the only one which we must take into consideration, the term "accident" means an unforseen, sudden or unexpected happening from the point of view of the one sustaining the damage and not of the tortfeasor. *Knight v. L. H. Bossier*, 118 So.2d 700; *United States Fidelity and Guaranty Co. v. Brisco*, 239 P.2d 754; *Moore v. Fidelity Casualty*, 205 P.2d 154. See also, *Appleman Insurance Law and Practice*, § 4492. Therefore, the fact that appellant, Island Constructors, Inc., foresaw or could foresee that the performance of the work could cause harm is not relevant. For the prejudiced parties, the sinking of their houses was a true accident, an unforeseen, sudden, and unexpected happening.

2. Insofar as the scope of American Surety Co.'s liability under the bond is concerned, the trial court decided: a)

[15] This part covers assignments IV, V, VI, VII, and VIII of petitions 64-214 and 64-188 and assignments (g), (h), (i), (j), (k), (l), and (m) of petitions 62-61 and 62-156 consolidated with the latter.

that "the obligation of restoring the neighboring properties to the state they had prior to the execution of the works, . . . is of a contractual nature and was assumed by Island Constructors, Inc. by virtue of the terms of the subcontract. Its surety is liable for the performance of this contractual obligation under the terms of the performance bond, irrespective of whether or not negligence in the execution of the works is established. . . ."[16] b) that even though the bond was not constituted for plaintiffs' benefit, they could claim as third-party beneficiaries; c) that American Surety Co.'s liability was not limited to the total amount of its bond; and, d) that American Surety Co. assumed obligations which were more ample and inclusive than that provided for in the bond upon deciding to complete the performance of the subcontract for which purpose it substituted the one under the bond, Island Constructors, Inc.

We need not consider whether plaintiff-appellees have the capacity to require the performance of the contractual obligations of Island Constructors, Inc. in connection with the restoration of the damaged properties to their original state. Also, we do not have to consider whether or not plaintiffs-appellees are entitled to claim under the bond executed by American Surety Co. for the execution of the work, since in view of our former conclusion fixing primary liability upon the Government of the Capital, the latter shall be directly liable to plaintiffs and, as we have already seen, Island Constructors, Inc. shall be held directly liable to the Government of the Capital for all damages the latter may pay to plaintiffs. In default thereof, its surety, American Surety Co. shall be held liable.

On the other hand, the construction contract of the Government of the Capital with Nolla, Galiby Co. contains an

[16] Conclusion of Law No. 12 of the trial court.

exemption clause which imposes upon the contractor the obligation of compensating the Government of the Capital for the damages the latter may have to pay on account of the execution of the work.[17] By virtue of said clause, Nolla, Galib y Co. would be liable also to the Government of the Capital in which case Island Constructors, Inc. would also be bound to pay Nolla, Galib y Co. any amount which the latter would pay to the Government of the Capital, because it was thus bound by Section 4 of the sub-contract with the former.[18] It is not necessary, however, to consider the liability of Nolla, Galib y Co. toward the Government of the Capital because the latter did not file any appeal against the provision of the judgment exempting the former.

3. Ordinarily the liability of an insurer is limited to the payment of the penalty which appears from the face of the bond. It was thus acknowledged by the trial court

[17] Said clause reads:

"General Conditions — 7.11 RESPONSIBILITY FOR DAMAGE CLAIMS.—

The contractor shall save harmless the Capital of Puerto Rico and all its officials, representative and agents from all suits, actions, or claims of any character brought on account of any injuries or damages received or sustained by any person, persons, or property through the acts of the contractor, his agents or servants, or by or in consequence of any neglect on the part of the contractor, or his agents or servants, in safeguarding the work, or through the use of inacceptable materials in the construction of the work, or by or on account of any claims or amounts recovered for any infringement of patent, trademark or copyright, and for any claims or amount arising from or recoverable under the Workmen's Compensation laws or any other laws, ordinances, by-laws, orders or decrees. *The contractor shall be responsible for all damage or injury to property of any character during the prosecution of the work resulting from any act, omission, neglect or misconduct in the manner or method of executing said work or due to the non-execution of said work at any time,* or due to defective work or materials, and such responsibility shall continue until the work has been completed and accepted by the Director." (Italics ours.)

[18] See footnote 14 where we reproduce said section 4.

but it concluded that in deciding to complete the subcontract American Surety Co. assumed a more ample and embracing obligation. The contention of the surety, American Surety Co., is that any obligation which by virtue of the bond it may assume is limited to the amount fixed in the bond itself. We do not agree.

When a surety undertakes the performance of a construction contract, as in this case, it assumes the obligations and liabilities of the original contractor. *Couch on Insurance* 2d § 47, 136; *Southern Surety Co. v. Scaby Independent School District*, 10 S.W.2d 786 (1928 Tex.); *McClintic-Marshall Corp. v. Maryland Cas. Co.*, 100 S.W.2d 438 (1937 Tex.); *Galesburg Sanitary Dist. v. American Surety Co.*, 32 N.E.2d 407 (1941 Ill.); *Mazzera v. Ramsey*, 238 P. 101 (1925 Cal.). It is in the same position as the original contractor with respect to the performance of the obligations which arise from the contract without limitation as to the total amount of the bond. *Citron v. Andrew*, 284 P.2d 544 (1955 Cal.). *Klein v. J. D. & J. M. Collins*, 106 So. 120 (1925 La.) where it was said at page 122:

> "Considering, first, the contentions of the surety company it may be said that, had that company, for instance, left it to the owner to complete the work upon the default of the contractors, unquestionably the company could not be held liable for more than the amount for which it had bound itself as surety, except for such additional amounts, imposed by law, such as costs of court and statutory penalties. . . . However, if the company, upon the default of the contractors, undertook to complete the work, a different case is then presented. In that event, the company, by such new undertaking, put itself in the place of the contractors from the moment of the new undertaking, and became liable for the costs of complet-

ing the building, without reference to the amount for which it had signed as surety. In other words, in that event, from that moment on, the company occupied the position of contractor and became liable for the costs of completion accordingly, and also for damages, as fixed in the contract, which it then undertook to execute, for the delay in completing and delivering the building."

In synthesis, the trial court did not err in concluding that the surety assumed an obligation more ample and embracing.

APPLICATION OF THE DOCTRINE OF COMPARATIVE NEGLIGENCE[19]

The trial court concluded that "the settlement of the grounds would have not caused damages to the neighboring structures if the latter would have been constructed in accordance with the methods accepted in engineering for subsoils of the type existing in Ocean Park." Appellants maintain that in view of this conclusion the trial court should have applied the doctrine of concurrent negligence and reduced proportionally the compensation. Although we would admit as valid this conclusion,[20] the same has a fatal defect: Appellants did not introduce any evidence to show that part of the damages were caused by the conditions of the structures and that part was caused by their own negligence. In the absence of such evidence in the record, appellant must assume liability for all the damages sustained. *Ortman* v. *W.R.A.*, 92 P.R.R. ——.

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[19] This part refers to assignment of error No. 9 of petitions 62-61, 62-156, and 64-214.

[20] Against this position assumed by appellants there is the principle of law that the one who acts negligently assumes the responsibility of repairing the damages within the state of things as the latter stood prior to the tortious act. See: PROSSER *Law of Torts*, 2d at p. 260.

ATTACK TO OUR JURISDICTION

Appellee, the Government of the Capital challenges our jurisdiction on the ground that the petition for review was untimely filed. It argues that the partial judgment rendered by the trial court on July 29, 1960 was a final judgment since "it decides the merits of the controversy, or the rights of the parties, without leaving anything for a future determination"; that said judgment dismissed the complaint as to the Municipality and likewise it dismissed the cross-claims made by Island Constructors, Inc. We do not agree.

Rule 44.2 of the Rules of Civil Procedure provides that when more than one claim is presented in action "the court may direct the entry of a final judgment upon one or more but not upon all of the claims *only upon an express determination that there is no just reason for delay in pronouncing judgment on such claims until final adjudication of the case and upon an express direction for entry of judgment*. In the absence of such determination and direction, any . . . decision, . . . which adjudicates less than all the claims *shall not terminate the action* as to any of the claims, and the . . . decision is subject to revision at any time before the entry of judgment adjudicating all the claims." (Italics ours.)

The partial judgment rendered on July 29, 1960 did not expressly conclude, pursuant to the provisions of Rule 44.2, that there was no reason to postpone rendering judgment on the claims against the Municipality. The requirement of Rule 44.2 should be strictly complied with since they seek to avoid confusion as to when the term to appeal or for review begins to count. Therefore, the judgment was not final until damages were adjudged on February 12, 1962.

ERROR NO. 10

The trial court granted Joaquin Valdivieso a compen-

sation of $13,300 for the damages to his property plus $3,900 for rentals he was bound to pay in Gallardo Apartments from August 8, 1959 to February 12, 1962, date on which the judgment appealed from was rendered, for having been forced to move from his house as a result of the damages sustained by the latter. Appellants complain that the court granted this compensation without any evidence whatsoever of the time reasonably needed to repair said plaintiff's residence.

From the evidence presented it appears that: a) Valdivieso was forced to move from his house as a result of the conditions of the latter; b) that he paid $83 monthly as amortization of a loan with F.H.A. and $130 monthly as rent in Gallardo Apartments; c) that he was an employee of Prison Industries of the Department of Justice; and d) that the damages to his residence were gradually manifested, for which reason we infer that it was not advisable to start repairing the house until we were sure that no more settlements would occur. Taking these circumstances as a whole, we consider that the trial court did not err in awarding the amount of $3,900 for rentals.

On appeal No. 62-68, Joaquin Validivieso Llompart in his turn appealed from the judgment rendered by the trial court charging as error that he was not granted compensation for the suffering and mental anguish "sustained on account of the continuous noises produced by the equipment of one or of all the defendants; for the bad odor caused by the backwater; all of which is and has been prejudicial and offensive to plaintiff's health and senses. . . ."[21]

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[21] The averment as it appears from the complaint is the following:

"9. — In view of all the annoyances aforementioned, of the ruinous condition of their residence, depreciation, repair expenses, physical suffering, and mental anguish sustained on account of the continuous noises produced by the equipment of one or of

He relies on *Pereira v. IBEC*, 95 P.R.R. ——— (1967). The doctrine established in the cited case is not applicable because mental anguish for nonperformance of contract was involved therein, while herein appellant's claim was based on the disturbance of his property.[22] But irrespective of the inapplicability of *Pereira v. IBEC*, *supra*, the assignment is untenable because the instant case involves the construction of a public work for the benefit of all the community and, as well put by the trial court, "Those are annoyances which every citizen must suffer. . . ."[23]

ERROR NO. 11

The court granted plaintiff Jeronimo Ruiz the amount of $7,031.10 for profits not received in his cafeteria and soda fountain from the date stipulated in the contract for the completion of the work, September 19, 1957, to the date when traffic was resumed along the section where his business was located, May 21, 1959. Appellant challenges this compensation on the ground that the inconveniences, annoyances, and hindrances which are necessarily caused in the course of a public improvement are not compensable. This is, without any doubt, the general principle. But

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all the defendants, for the bad odor caused by the backwater, all of which is and has been prejudicial and offensive to plaintiffs' health and senses; for the interruption of the free and comfortable use of their property, impairing their personal well-being; the fear that the house may collapse upon them; expenses incurred and to be incurred, the plaintiffs have sustained damages which they assess at the amount of NINETY-THOUSAND DOLLARS ($90,000)."

[22] The theory adduced by appellant before the trial court was set forth in the following manner:

"Mr. Martinez, Jr.:

No damages for moral suffering or damages to a property are claimed herein. Damages are claimed here on the basis of § 277 of the Code of Civil Procedure." Tr. of Ev., Vol. 2, p. 173.

[23] Tr. of Ev. 3, p. 176.

as every general rule, it has its limitations imposed by reason and by justice. The street should not be obstructed unnecessarily. Even when necessary, the obstruction should not be maintained for an unreasonable length of time. *Lithovit v. City of Chicago*, 87 N.E. 58 (1908, Ill.); *Cassel v. City of New York*, 153 N.Y. Supp. 410 (1915). See also cases cited in: *Annot: Liability of Public Contractor to Property Owner for Obstructing Street*, 68 A.L.R. 1510.

In the case at bar the term agreed upon for the completion of the work was about five months. However, traffic was interrupted for about twenty months. In the light of the facts which we have previously set forth, we conclude that this interruption was unreasonable. The error assigned was not committed.

ERROR NO. 12

Appellee, Leon Lyons[24] filed his complaint against Island Constructors, Inc. on August 8, 1958. He never had the summons issued, but in February, 1959 he amended the complaint in order to join as defendant American Surety Co. as surety of Island Constructors, Inc. and under the terms of the insurance policy.

Appellant assigns as error that the trial court did not declare that the complaint in this case had prescribed. It alleges that in accordance with *Heirs of Gorbea v. Portilla*, 46 P.R.R. 279, and *De Jesus v. De Jesus*, 37 P.R.R. 143, the interruption of the limitation period by the institution of a suit has the effect that such period must be counted anew when the interruption ceases. Hence it concludes that the cause of action against Island Constructors, Inc. has prescribed. It also argues that when American Surety Co. was included as defendant in February, 1959, more than a year had elapsed since the occurrence of the damages. We do not agree.

[24] Petition for Review No. 61-188.

With respect to the interruption of the limitation period by the filing of the complaint against Island Constructors, Inc., appellant's contention was already decided against its claims in *Feliciano* v. *W.R.A.*, 93 P.R.R. —— (1966).

With respect to the defense of prescription of American Surety Co., it suffices to refer to § 20.030(2)[25] of the Insurance Code, 26 L.P.R.A. § 2003, which recognizes plaintiff's right to bring suit against the insurer even after securing final judgment against the insured. This means that in the case at bar the cause of action against American Surety Co. is still on time, although more than ten years have elapsed since the complaint was amended to join it as defendant. See: *Trigo* v. *The Travelers Ins. Co.*, 91 P.R.R. —— (1965), which contains a magnificent discussion on the origin and scope of the aforesaid § 20.030.

ERROR NO. 13

This assignment refers to Petition for Review No. 64-214. It is alleged that the trial court erred in not declaring that the complaint of Heriberto Berly had prescribed; said complaint had been filed on November 2, 1958.

From the hearing held on October 27, 1961 to argue the motion for dismissal on the ground of prescription, it is inferred that the damages were "produced or noted . . . from the month of April or March, 1957 to about a month ago,"[26] that plaintiff Berly sent a letter to Nolla, Galib y Co. on February 28, 1958 claiming damages; that said letter was sent to Island Constructors, Inc. Therefore, Berly's claim has not prescribed.

[25] Section 20.030(2) reads as follows:

"If the plaintiff in such an action brings suit against the insured alone, such shall not be deemed to deprive him of the right, by subrogation to the rights of the insured under the policy, to maintain action against and recover from the insurer after securing final judgment against the insured;"

[26] Answer given on March 6, 1959 by plaintiff Berly to interrogatories submitted to him by American Surety Co. said answer was admitted in evidence.

Judgment will be rendered consistent with the terms and conclusions of this opinion.

CLERK'S CERTIFICATE

I, Joaquin Berrios, Secretary of the Supreme Court of Puerto Rico, Do Hereby Certify

That the foregoing is a true and faithful translation from Spanish into English of the opinion rendered by the Supreme Court of Puerto Rico on June 27, 1969, in the above-entitled case, the original of which, in Spanish, is under my custody in this office.

In Witness Whereof and at the request of the interested party and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court, at San Juan, Puerto Rico, on this 6th day of February, 1970.

[Seals]

(s) Joaquin Berrios
Joaquin Berrios
Clerk, Supreme Court of
Puerto Rico

[Seal]